Supreme Court, U.S.
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No. 09-

IN THE

Supreme Court of the United States

U-HAUL CO. OF CALIFORNIA,

Petitioner,

v.

CITY OF BERKELEY, CITY COUNCIL OF THE CITY OF BERKELEY, LINDA MAIO, DARRYL MOORE, MAXWELL ANDERSON, DONA SPRING, BETTY OLDS, KRISS WORTHINGTON, AND GORDON WOZNIAK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION THREE

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a governmental body must meet the substantive due process standard of review, articulated in *Lawton v. Steele*, 152 U.S. 133 (1894), when, pursuant to its police power, it revokes a use permit under which a business has a vested property right.

2. Whether substantive due process review requires a consideration of the imposition of less drastic remedies in a case of permit revocation.

CORPORATE DISCLOSURE STATEMENT

Petitioner U-Haul Co. of California discloses that the following publicly held companies own 10% or more of U-Haul's shares: Amerco.

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U-Haul Co. of California respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeal of the State of California, First Appellate District, Division Three.

OPINION BELOW

The decision of the California Court of Appeal is not officially reported but is available at 2009 WL 804150 and is reproduced in Appendix A at 1a – 25a.

JURISDICTION

The judgment of the California Court of Appeal was issued on March 27, 2009. Appendix A. U-Haul's timely Petition for Review with the Supreme Court of the State of California was denied on June 10, 2009. Appendix E. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Amendment XIV of the United States Constitution, Section 1, provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

This case arose when the City of Berkeley deprived Petitioner U-Haul Co. of California of its property, namely the conditional use permit under which U-Haul has operated in the City for over thirty years. The City – and, subsequently, the California courts – improperly refused to consider whether a less drastic remedy was available.

The revocation of a land use permit – an act that has the severe effect of putting the licensee out of business – is an exercise of the police power that is subject to the protections of substantive due process. Pursuant to *Lawton v. Steele*, 152 U.S. 133 (1894) and its progeny, substantive due process requires that a government agency refrain from revoking a use permit if it is feasible for the agency to employ a less restrictive remedy that achieves the same goals.

The law concerning the application of substantive due process to land use contexts is conflicted and in need of resolution and guidance from this Court. "The Supreme Court has not provided firm and coherent guidance to lower courts confronted with these issues and, therefore, essentially has forced circuit and district courts to develop their own approaches to substantive due process claims." David H. Armistead, *Substantive Due Process Limits on Public Officials' Power to Terminate State-Created Property Interests*, 29 Ga.L.Rev. 769, 770 (1995). Therefore, U-Haul respectfully requests that this Court intervene in this matter and grant this Petition for Certiorari.

U-Haul Co. of California is a California corporation that operated a truck-sharing facility in the City of Berkeley from prior to 1975, when the City issued the company a conditional use permit (Administrative Record ("AR") 36-38), until 2008, when the City revoked its use permit. From the business' inception, U-Haul operated the facility for over twenty years without significant incident or complaint.

In 2004, the City sent U-Haul a Notice of Violation regarding the parking of trucks on the street. (AR 56.) In 2006 and 2007, the City, in response to purported "aggressive complaints," began a survey and investigation of U-Haul (AR 137), including weekly inspections of the facility from May 2006 to June 2006. (AR 399.) U-Haul met with the City in August 2006 and confirmed its steps to improve the facility and meet with community members. (AR 58.)

In 2006 and 2007, at the direction of City staff, U-Haul applied for a use permit modification to increase the number of trucks allowed, decrease the number of trailers allowed, and to include spaces for overflow trucks. (AR 10-11, 66-68, 72-77) At the same time, U-Haul appealed several of the citations, arguing that parking vehicles on the street did not constitute a modification of the use permit, and that the increased use of trucks did not intensify the use of the property beyond that permitted by the use permit because U-Haul had reduced its number of trailers. As the use permit stated that the company would be using "*Approximately* 20 Rental Trucks and 30 Rental Trailers" [emphasis added], U-Haul had kept under 50 total vehicles on the lot. (AR 88-92.)

During the appeal process, the City conceded that customers were allowed to "park their rented trucks on the street when they return them" – provided U-Haul promptly retrieved them. (AR 95.) Further, the City's Administrative Hearing Officer dismissed a large fine for excessive trucks on the facility lot, finding that the permit condition regarding the maximum amount of vehicles on the lot was "not sufficiently detailed, consistent, or unambiguously articulated" and that there was a "fundamental flaw in the City-mandated numerical limit." (AR 100.)

The City Zoning Adjustments Board ("ZAB") commissioned a staff report regarding U-Haul's business operations and subsequently conducted a hearing in June 2007 regarding U-Haul's use permit. The ZAB staff report advised the ZAB to recommend that the City Council determine what conditions were applicable to the use permit, that U-Haul had violated the use permit, and that specific additional conditions be imposed on the use permit.[1] (AR 14-15).

At the hearing, however, the ZAB raised the possibility of revoking U-Haul's use permit – a remedy that was not part of the staff report's recommendations. One ZAB member noted concern at the possibility of

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1. These specific recommendations included conditions such as (1) not allowing one-way rentals to be returned to the Berkeley facility, (2) requiring U-Haul's attendance at bi-monthly neighborhood meetings, and (3) removing the term "approximately" from the maximum vehicle count, among others. (AR 14-15).

taking such a drastic step based on alleged violations of unclear language in the use permit:

> "And so here we are saying that we're going to revoke their use permit because they're in violation of their use permit, yet our own hearing officer says the use permit isn't clear. That concerns me a little bit. It seems we would want to clarify the use permit, and then revoke it."

(AR 146). Nevertheless, a ZAB member moved to go beyond the staff recommendation and recommended revoking the use permit. (AR 139.) Ultimately, the ZAB resolved to recommend that the City Council revoke U-Haul's use permit. (Appendix C at 30a-31a.)

The City Council held a public hearing on the issue in September 2007. (AR tabs 6, 14.) At the hearing, the City's Code Enforcement Supervisor admitted to submitting a one-sided report to the Council that contained only the evidence supporting the ZAB's recommendation. (AR 163). U-Haul also submitted papers and testified at the hearing. (AR tab 13.) U-Haul submitted written testimonials from businesses and individuals noting that U-Haul had substantially corrected all problems. (AR 395-398.) Though U-Haul admitted to certain issues regarding internal company communications, it also showed compliance with City requests (AR tab 13) and communication with neighbors (AR 402-403).

Additionally, though U-Haul's counsel proposed less drastic measures similar to those recommended by City staff, *i.e.*, that the City impose strict enforceable conditions on the use permit instead of revoking it (AR 509-510), the City Council voted to revoke the use permit (AR 406-407), and later formally adopted a resolution to revoke the permit. (Appendix D at 32a-47a.)

U-Haul filed a complaint and petition for writ of mandate against the City and related persons in Alameda Superior Court in October 2007. (Clerk's Transcript ("CT") 1-10.) U-Haul submitted its memorandum of points and authorities in support of the petition in December 2007, in which it raised the issue presented here, arguing among other things that the revocation was a deprivation of a vested right in the permit based on U-Haul's 30-year reliance on the permit. U-Haul argued that the City's actions constituted "interference with the constitutional right to carry on a lawful business" in violation of the *Lawton* substantive due process test as articulated in *Korean American Legal Advocacy Foundation v. City of Los Angeles*, 23 Cal.App.4th 376 (1994) (CT 169-170).[2]

U-Haul reiterated the substantive due process issue in its reply brief to the trial court in support of the writ petition, this time further emphasizing the constitutional

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2. The precise language of the *Korean American* articulation of the *Lawton* test is as follows: "In order to justify the interference with the constitutional right to carry on a lawful business it must be clear the public interests require such interference and that the means employed are reasonably necessary to accomplish the purpose and are not unduly oppressive on individuals." 23 Cal.App.4th at 391, fn. 5.

nature of the issue and the "unduly oppressive" prong of the *Lawton* test. (CT 169). In its order denying the petition, however, the court did not address U-Haul's constitutional contentions whatsoever (Appendix B at 26a-28a).

In June 2008, U-Haul filed a notice of appeal of the denial of the writ petition. (CT 484-485.) In its opening brief, U-Haul again asserted that the permit revocation violated its constitutional rights because "(1) it terminates a vested property right, (2) the City had less oppressive remedies available, and (3) the revocation was in excess of the findings." (Appeal Opening Brief at 23). The brief continued by again citing to the *Korean American* articulation of the *Lawton* test. *Id.* Later, in its reply brief, U-Haul argued against the City's contention that the *Lawton* test did not apply to revocations based on alleged violations of permit conditions, citing *Korean American* for the proposition that

> "it is clear revocation of a use permit could have the effect of putting the licensee completely out of business. It is consequently a very harsh remedy which requires the strictest adherence to principles of due process. Whenever alternate remedies can achieve the same goal, such as the imposition of additional conditions or controls, these avenues ought to be pursued if feasible."

23 Cal.App.4th at 390, fn. 5. (Appeal Reply Brief at 14).

The appeal was heard by the Court in March 2009, and the Court of Appeal affirmed the trial court's denial of the writ petition. The Court of Appeal drew a distinction between a permit that is revoked for alleged operation of a nuisance and one that is revoked for alleged violations of the terms and conditions of the permit. Specifically, the Court of Appeal held that while businesses whose activities constitute a nuisance are afforded the due process inquiry articulated in *Lawton* and *Korean American*, businesses that allegedly violate permit conditions are not:

> "the three requirements [under the *Lawton* test] – that the public interest require [*sic*] municipal interference, that the means employed are reasonably necessary to accomplish the purpose, and that the means employed are not unduly oppressive – related to the second ground (the existence of a compelling public necessity) rather than the first ground (the failure to comply with the permit's reasonable terms or conditions)."

Appendix A at 17a-18a. It is unreasonable and inequitable, however, that "conditions violators" would simply be cut out of the otherwise relatively expansive breadth of substantive due process in land use matters, without any indication of the constitutional basis for the omission.[3]

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3. As U-Haul argued to the California Supreme Court, such a rule essentially allows the perverse result that a permittee who is a nuisance-maker will receive more legal protection that

(Cont'd)

U-Haul petitioned the California Supreme Court for review in May 2009. In its petition, U-Haul argued that the Court of Appeal's distinction between permit conditions violators and those whose activities constitute a nuisance not only failed to meet the *Korean American* requirement of "[strict] adherence to principles of due process," including the imposition of alternate remedies whenever possible, it also failed to adhere to the broad brush of the *Lawton* factors, which are required whenever "the state [interposes] its authority in behalf of the public." *Lawton*, 152 U.S. at 137. The California Supreme Court, however, denied review, and U-Haul now respectfully requests this Court to intervene regarding this important constitutional question.

REASONS FOR GRANTING THE PETITION

I. The Substantive Due Process Standard Articulated in *Lawton v. Steele* Applies to All Exercises of the Police Power, Including Revocations of Use Permits

This Court and many others have long interpreted the Fourteenth Amendment to provide substantive due process protections for government intervention into and regulation of private property rights: "[The

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a permittee who has violated benign but reasonable terms of its permit. This will, in turn, encourage government agencies to do what the City has done – bootstrap code sections onto permit conditions and thusly avoid substantive due process considerations. Such a loophole in the exercise of the police power flouts constitutional notions of justice and endangers private property rights.

Fourteenth Amendment] has been read broadly to extend protection to any significant property interest." *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972).

The police power, a core vehicle for government intervention into private property rights, is subject to these substantive due process protections. The seminal decision in *Lawton v. Steele*, 152 U.S. 133 (1894) defines the limits of the police power by imposing a restrictive substantive due process test on the entire exercise of the power, which "is universally conceded to include everything essential to the public safety, health, and morals . . . the state may interfere wherever the public interests demand it." 152 U.S. at 136. The test provides that

> "to justify the state in . . . interposing its authority on behalf of the public, it must appear – First, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."

152 U.S. at 137.[4]

4. See also *Treigle v. Acme Homestead Ass'n*, 297 U.S. 189, 197 (1936) ("[The police power] must be exercised for an end which is in fact public and the means adopted must be reasonably adapted to the accomplishment of that end and must not be arbitrary or oppressive.").

As the language of the *Lawton* decision specifically includes *all* cases where the government interposes its authority on behalf of the public, the *Lawton* three-prong test was intended to apply to a wide range of government regulation.[5] This principle remains valid and has been reiterated by courts on many occasions. *See Presbytery of Seattle v. King County*, 114 Wash.2d 320, 330 (1990) (referring to the *Lawton* test, which measures "whether the police power . . . has exceeded its constitutional limits," as the "classic" due process test); *see also Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594-595 (1962) ("The classic statement of the rule in *Lawton v. Steele* [regarding "public encroachment upon private interests"] . . . is still valid today.").

It has also been repeatedly held that both the imposition of conditions on private land uses and the revocation of such permits are exercises of the police power. *See O'Hagen v. Board of Zoning Adjustment*, 19 Cal.App.3d 151, 158 (1971) ("Legislation requiring that a permit be issued by a municipality as a condition precedent to the erection of a structure on property privately owner, or to the use that may be made of such property, if reasonable, is a valid exercise of the police power."); *see also Rith Energy, Inc. v. U.S.*, 270 F.3d 1347, 1352 (Fed. Cir. 2001) ("[T]he revocation of the

5. This seems fundamentally fair: substantive due process *should* provide a check against overly oppressive government actions. This is especially true in a property context, as the Framers viewed private property protections as paramount in a free society, a view which continues today: "there is no greater expression of freedom and liberty than in defense of the God-given right of an individual to hold, possess, and use private property." H.J. Res. 94, 110th Cong. (2008).

permit . . . was an exercise of the police power directed at protecting the safety, health, and welfare of the communities . . .").

Further, in the present matter, the harm that the City sought to remedy through its regulation of U-Haul's business consisted of negative parking and traffic impacts on the neighborhood surrounding U-Haul's business. "Parking, traffic, and visual impact were problems expressed by some of the neighbors, [and they clearly] represent concerns that fall well within the domain of public interest and welfare." *Guinnane v. San Francisco City Planning Comm'n*, 209 Cal.App.3d 64, 76 (1972). Therefore, as the government action at issue is the City's revocation of U-Haul's use permit based on alleged violations of permit conditions that the City itself imposed, and as the City acted on behalf of the public interest in attempting to ameliorate parking and traffic conditions, the action is an exercise of the City's police power and should be subject to the *Lawton* analysis. The lower courts, however, either ignored or expressly declined to apply the test.[6]

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6. The Court of Appeal did hold, however, that the *Lawton* test still applies in permit revocations based on nuisance grounds – indicating the ongoing vitality of the balancing analysis. As stated above, U-Haul disputes the Court of Appeal's contention that permit revocations based on purported conditions violations (as opposed to revocations based on nuisance grounds) are not government actions that are subject to due process and the *Lawton* balancing analysis.

II. Substantive Due Process Requires a Weighing of the Burdens on the Property Owner Against the Benefits of Exercising the Police Power

As *Lawton* indicates, the benefits the state seeks to achieve through an exercise of the police power must be weighed against the impact of the regulation on the private landowner: "Generally, in the valid exercise of the police power are included all things essential to the conservation of the public safety, public health, and public morals. But this sweeping general rule is modified by a consideration of the rights of the private individual." *U.S. v. Cohen*, 268 F. 420, 423 (E.D.Mo. 1920).[7] The hallmark of the *Lawton* test, then, is its provision that that governmental regulation be proportional to the goal it seeks to achieve. As stated in a recent decision that explores the *Lawton* test in depth, *Presbytery of Seattle v. King County*, 114 Wash.2d 320 (1990), "the third inquiry [whether the regulation is unduly oppressive on the landowner] will usually be the . . . determinative one." *Id.* at 331.

For example, in *Korean American Legal Advocacy Foundation v. City of Los Angeles*, 23 Cal.App.4th 376

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7. See also *City and County of San Francisco v. Market Street Railway Co.*, 98 F.2d 628, 632 (C.A.9 1938) ("The means employed must have a real and substantial relation to, and must have some fair tendency to accomplish or aid in the accomplishment of the ends sought. On the other hand, if the means chosen are arbitrary and unreasonable, capricious, *or beyond the necessities of the case*, then the Fourteenth Amendment is violated, and it is the duty of the federal courts to declare the statute, ordinance, order or regulation void." [emphasis added]).

(1994), a California appellate decision which involved the revocation of a liquor store's use permit, the court held that "in order to justify the interference with the constitutional right to carry on a lawful business it must be clear the public interests require such interference and that the means employed are reasonably necessary to accomplish the purpose and are not unduly oppressive on individuals." *Id* at 391, fn. 5, citing *Lawton*.[8] The *Korean American* court went on to state, crucially, that

> "it is clear revocation of a use permit could have the effect of putting the licensee completely out of business. *It is consequently a very harsh remedy which requires the strictest adherence to principles of due process. Whenever alternate remedies can achieve the same goal, such as the imposition of additional conditions or controls, these avenues ought to be pursued if feasible.*"

Id (emphasis added).

With respect to the necessity of weighing a government action against the property right it impedes (typified by the burdensome action of permit revocation), an apt analog may be found within the recent decisions of this Court. In *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005), the Court addressed the historic confusion regarding the distinction between takings claims and substantive due process claims, a confusion which had been perpetuated in part by *Agins*

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8. See also *O'Hagen v. Board of Zoning Adjustment*, 19 Cal.App.3d 151, 159 (1971).

v. City of Tiburon, 447 U.S. 255 (1980), which referred to the "substantially advances" test in connection with takings doctrine. The *Lingle* Court, in rejecting this test, expressly incorporated the "magnitude or character of the burden a particular regulation imposes upon private property rights" into the takings analysis. 544 U.S. at 542.

In this way, *Lingle* – like *Lawton* and *Korean American* – recognizes that when a government regulation has a substantial adverse impact on a private landowner, a measure of balancing must occur:

> "The 'substantially advances' formula suggests a means-ends test: It asks, in essence, whether a regulation of private property is *effective* in achieving some legitimate public purpose ... the 'substantially advances' inquiry reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights. [T]his test does not help to identify those regulations whose effects are functionally comparable to government ... invasion of private property; it is tethered neither to the text of the Takings Clause nor to the basic justification for allowing regulatory actions to be challenged under the Clause."

Id.

U-Haul, recognizing that the doctrines are distinct, does not here attempt to conflate takings claims and substantive due process claims. Rather, takings claims provide a useful example of this Court's approach to a clear invasion of a property right. If weighing the burden to the property owner is necessary in a takings context – as *Lingle* holds – then it is also necessary in a substantive due process claim, at least where, as here, the invasion of a property right is just as severe.

III. Lower Courts Have Applied Multiple Conflicting, Vague, and Inappropriate Tests in Assessing Substantive Due Process Issues

While the *Lawton* standard is equitable, broadly applicable, and clear – evidenced by its continued use for over 100 years – some courts have gone astray from the balancing test that is so necessary to provide real protection for the individual from abusive and disproportionate government regulation. In substantive due process cases involving land use matters, other various standards of review have cropped up, including the "shocks the conscience" test,[9] the "substantially advances" test, and the "conceivable rational relationship" test.[10] None of these tests is altogether clear, and, as explained below, none of these tests – at least in the severe context of a use permit revocation – properly measures whether the burden to the landowner is commensurate with the goal the government regulation purports to achieve.

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9. See *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998).

10. See *Gilbert v. City of Cambridge*, 932 F.2d 51, 65 (1st Cir. 1991).

Due in part to these myriad tests, academics and legal commentators have frequently noted that the unsettled standard of substantive due process review in land use matters has resulted in confusion. *See* Morton Gitelman et al., *Land Use: Cases and Materials*, 997 (6th ed. 2003) ("Attorneys . . . are often frustrated in pursuing substantive due process claims because of the unsettled question of what standard to apply."). *See also* Brian Blaesser & Alan Weinstein, *Federal Land Use Law and Litigation*, §1:13 (2005 ed.) ("The Supreme Court has not given clear direction on how to apply substantive due process in land use cases, so lower federal courts are divided on what substantive due process means.").

The case law reflects this discord. In *Pearson v. City of Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992), the Sixth Circuit undertook to "collate the law" and "catalogue the various approaches" of the various federal circuits in zoning-related substantive due process cases. *Id.* at 1214. The court discovered a "remarkable lack of uniformity," stating that "we wish it were in our power to harmonize [the conflicting federal decisions regarding substantive due process and zoning], but the conflicts among the circuits are too great. Harmony will have to await action by the Supreme Court." *Id.* at 1220, fn. 45.

Per *Pearson*, the First Circuit, for example, inquires not into the actual motive for the government action, but rather whether there is any "conceivable rational relationship" between the government action and "legitimate government ends." *Id* at 1217 [citations omitted]. The Second Circuit is described as "hostile to

federal zoning plaintiffs," reigning in the scope of protected property rights that give rise to a viable substantive due process claim in the first place. *Id.* at 1217-1218. The Sixth Circuit has used both the "arbitrary and capricious" test and the "shocks the conscience" test. *Id.* at 1218. The Seventh Circuit, on the other hand, has imposed an "invidious or irrational" test. *Id.* at 1219. The Eighth Circuit, according to *Pearson*, considers the question of whether a substantive due process claim may arise from denial of a zoning permit to be an open one. *Id.*

Not only are the circuits in conflict regarding what test to apply in a substantive due process claim, they are also in conflict regarding the characterization of a subject government action as legislative (which, according to *Pearson*, generally entitles the government to a more deferential standard of review) or as administrative (which generally requires more government scrutiny):

> "[The various circuits'] precedents are not harmonious. Some consider all zoning decisions legislative, subject to only the most limited scope of review. Some state a general view for irrationality, without differentiating between legislative or administrative actions. Some classify decisions by the local legislative body as legislative while denominating actions by administrative boards, such as the board of adjustments, as administrative. Even this is not a hard and fast rule . . . this circuit has stated that the legislative/administrative distinction is of little utility, holding that when

> a relatively small number of persons are affected on individual grounds, the action is considered administrative ... it has also been said that the difference is between prospective, legislative-type rules and enforcement."

Pearson, 961 F.2d at 1220 (citations and quotations omitted).[11]

These multiple standards fail to protect the property owner's constitutional right to substantive due process. First, they are largely undefined and therefore subjective – for example, what does it mean to "shock the conscience"? Further, and most crucially, many of the tests applied – including the analysis done by the California Court of Appeal here – fail to adequately consider an essential part of the due process analysis, i.e. the impact on the landowner. As *Lawton* and its progeny make clear, substantive due process requires a proportionality between the government action and the invaded property right.

The nation's courts should not continue to pick and choose among vague, inappropriate tests in the

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11. This distinction is important because most of the cases cited in *Pearson* involved "legislative" government actions, which dealt with denials of variances, permits, or site plans – *prospective* situations. The current matter, however, deals with *enforcement*, which involved significant fact-finding and the revocation of an already-vested property right. U-Haul contends that the *Lawton* weighing analysis is especially important in the context of these "corrective," individualized government actions.

important arena of constitutional rights. Indeed, "misunderstandings about the concept of substantive due process and its underlying aims exacerbate the problem [posed by the multiplicity of standards]. Often, this confusion results in an inadequate remedy for victims of wrongful government action." David H. Armistead, *Substantive Due Process Limits on Public Officials' Power to Terminate State-Created Property Interests*, 29 Ga.L.Rev. 769, 770 (1995).

IV. The Weighing of Benefits and Burdens Must Include an Evaluation of Any Less Drastic Available Remedies

Any comparison of the benefits and the burdens of a particular exercise of state power must take into account the availability of less drastic remedies. If the state can achieve the alleged benefits it seeks by alternate means that do *not* impose a severe burden on a property owner, then it must do so; otherwise, the state is imposing the more severe burden with no countervailing benefit, which is plainly a violation of substantive due process. *See Goldblatt v. Town of Hempstead*, 369 U.S. 590, 595 (1962) ("To evaluate [a land use ordinance's] reasonableness we therefore need to know such things as the nature of the menace against which it will protect, *the availability and effectiveness of less drastic protective steps*, and the loss which appellants will suffer from the imposition of the ordinance.") [emphasis added].

Lower courts have similarly recognized the importance of considering less drastic alternative remedies specifically in the context of land use decisions.

See Korean American, 23 Cal.App.4th at 390 fn. 5 ("Whenever alternate remedies can achieve the same goal, such as the imposition of additional conditions or controls, these avenues ought to be pursued if feasible.").

Presbytery of Seattle v. King County, 114 Wash.2d 320 (1990) provides an excellent model of how to engage in the *Lawton* analysis. In *Presbytery*, a land use case, the Washington Supreme Court cited the "classic" *Lawton* doctrine and posited several factors to assist with the inquiry into the "unduly oppressive" prong of the *Lawton* due process test – the prong that assesses the appropriateness of the burden imposed on the individual:

> "The 'unduly oppressive' inquiry ... implies a balancing of the public's interest against those of the regulated landowner. We have suggested several factors ... to consider ... whether a regulation is overly oppressive, namely: the nature of the harm sought to be avoided; the availability and effectiveness of less drastic measures; and the economic loss suffered by the property owner."

114 Wash.2d at 331.[12]

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12. *Presbytery* also held that the "two constitutional theories [takings and substantive due process] are *alternatives* in cases where overly severe land use regulations are alleged." The court identified two pertinent differences between takings and due process claims – the remedy sought (compensation

(Cont'd)

Finally, this Court similarly stressed the need to consider less drastic remedies in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), when it reversed a punitive damages award on substantive due process grounds:

> "The sanction imposed in this case cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal."

Id. at 584.

Thus, the City of Berkeley (and the California courts reviewing its decision) was obliged to consider whether a less drastic sanction than permit revocation – essentially the "death penalty" for a business – would accomplish the City's professed goals. As shown below, the City failed to do so.

V. Here, the City's and the Lower Courts' Failure to Consider the Burdens on U-Haul Resulted in a Violation of U-Haul's Substantive Due Process Rights

In the instant case, U-Haul, by its 30 years of reliance on its use permit, had a vested right in the permit which entitled it to constitutional protection.

(Cont'd)

versus invalidation) and the effect on the public (conferral of benefit versus protection from harm). Thus, this further demonstrates that, while takings and substantive due process are distinct claims, there are circumstances where a regulation is so severe that a similar weighing analysis must be employed.

See Kerley Industries, Inc. v. Pima County 785 F.2d 1444, 1446 (9th Cir. 1986) (A conditional use permit creates a property right which may not be revoked without constitutional rights of due process). In its revocation efforts, however, the City did not pursue alternate remedies, even though (1) the staff report commissioned by the City's Zoning Adjustment Board recommended specific additional conditions to be imposed on the use permit (such as not allowing one-way rentals to be returned to the Berkeley facility, requiring attendance at bi-monthly neighborhood meetings, and removing the term "approximately" from the maximum vehicle count) (AR 14-15), (2) the Zoning Adjustment Board members themselves expressed concern that the permit conditions were unclear (AR at 146), and (3) U-Haul's counsel also proposed the imposition of new, strict conditions on business operations at a meeting of the City Council (AR 509-510).

The record thus shows that it was certainly feasible for the City to adopt a less draconian remedy than total revocation of the permit – clarification of the permit, for example, or imposition of new conditions, or an order temporarily suspending U-Haul's business until the perceived problems were corrected. Indeed, as no meaningful discussion occurred regarding the proposed additional conditions, the City demonstrated no evidence that any of these alternate remedies would be ineffective or unfeasible.

To apply a "conceivable rational relationship" or a "substantially advances" test to the City's decision essentially gives the City (and, by extension, any other

government body) carte blanche to choose the most radical and severe regulation simply because it effectuates this goal – it allows a sledgehammer where a scalpel is needed. As a result, these tests provide very little of the "strictest adherence to principles of due process" that *Korean American* requires, largely ignore the landowner's valuable vested property right, and allow for regulations that are "unduly oppressive on individuals," which *Lawton* forbids.

Applying the *Presbytery* factors, articulated above, to the present matter further shows that the revocation of U-Haul's use permit *is* unduly oppressive. First, the harm sought to be remedied is an alleged overabundance of moving trucks at and around a business, which does not represent a grave or otherwise permanent threat to the community welfare. Second, as explained above, City staff themselves indicated the availability and effectiveness of less drastic measures by proposing to clarify the permit conditions and to impose specific additional conditions on the use permit.[13] Even a temporary suspension of business operations pending resolution of the overabundance of trucks would be significantly less drastic and equally as effective. Third, it is clear that the economic loss suffered by U-Haul is great – a complete closure of its truck business. As U-Haul testified, the facility served approximately 12,000 local residents per year. (AR 382.)

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13. Indeed, the gravity of the revocation remedy is all the more pronounced considering the City's own Administrative Hearing Officer, after presentation of evidence and argument from both sides, found that the vehicle limit condition itself was vague and unenforceable. (AR 100.)

Weighing these factors together, it is clear that the burden of revocation to the U-Haul is unduly oppressive given the availability of other, less severe – yet feasible – solutions.

CONCLUSION

As shown above, the City of Berkeley and the lower courts violated U-Haul's substantive due process rights in revoking U-Haul's use permit without adequately considering less drastic remedies that were available.

The issue presented by this case, however, reaches beyond one particular land use decision. As the Sixth Circuit noted in *Pearson*, the confused state of affairs brought about by the conflicting standards applied by the various federal and state courts to substantive due process claims "awaits action" by this Court.

Accordingly, this Court should grant certiorari and resolve the questions presented, to ensure uniformity of decision in this important and growing area of law.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION THREE FILED MARCH 27, 2009

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT DIVISION THREE

No. A121811

U-HAUL COMPANY OF CALIFORNIA,

Plaintiff and Appellant,

v.

CITY OF BERKELEY et al.,

Defendants and Respondents.

(Alameda County Super. Ct. No. RG07-0352204)

This is an appeal from a judgment by the trial court denying appellant U-Haul Company of California's petition for writ of mandate (the writ petition). Appellant's unsuccessful writ petition challenged a decision by respondents City of Berkeley and the Berkeley City Council (collectively, the City) to revoke a use permit the company was granted in 1975 to operate a truck and trailer rental business.[1] Appellant seeks

1. The individual members of the Berkeley City Council are also named as respondents in this appeal.

reversal of the judgment on the grounds that the evidence was insufficient to support the trial court's decision to uphold revocation of the use permit, and that its due process rights were violated during the revocation process. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On May 27, 1975, appellant submitted a use permit application requesting the right to operate a U-Haul facility for renting trucks and trailers at the property located at 2100 San Pablo in the City of Berkeley. The property, less than three miles from the University of California's Berkeley campus, was in an area zoned as a limited commercial district abutting a residential district. The use permit application proposed the following use: "To conduct a U-Haul Moving Center-Renting of U-Haul Trucks, Trailers, furniture pads, hand trucks, etc. Sale and installation of permanent frame hitches. Approximately 20 Rental Trucks and 30 Rental Trailers. Two full-time and two part-time employees—open from 8:00 a.m. to 7:00 p .m."

On July 15, 1975, the City issued the use permit to appellant. The use permit set forth several general conditions, including that "the plans submitted with the application shall be followed and that all of the assurances and commitments contained in the original application shall be met except as they may be modified by the special conditions listed below." Relevant here, the use permit set forth as a special condition that "the use permit shall be subject to review, attaching of

additional conditions, or revocation if persistent complaints are received that the operation is detrimental to the neighborhood."

Not long after the City issued the use permit to appellant, tension arose between appellant and its neighbors, particularly due to the parking of appellant's trucks on streets adjacent to the property. Eventually, in 1996, complaints regarding appellant's use of neighborhood streets for parking its vehicles came to the City's attention, leading it to issue a First Notice and Order to Correct to appellant. Such notice, among other things, warned appellant that all uses granted pursuant to the permit were "ON THE PROPERTY ONLY," and that violations of said restriction could lead to review and revocation of the permit.

In response to the notice, appellant advised in October 1997 that it would "attempt to reduce the inflow of equipment" by, among other things, opening a new facility in a nearby city with more parking, placing a premium on outgoing rates to Berkeley from other facilities, and insisting that customers renting at the Berkeley facility return the vehicles elsewhere. It is unclear whether such corrective steps were actually implemented, however, it does appear that complaints from the neighbors "sort of subsided" around this time period.

In June 2000, the City again issued a warning to appellant regarding its improper use of adjacent streets for parking its vehicles after receiving complaints from

neighbors. When the violations continued, the City issued a criminal citation to appellant, which again promised to take corrective steps to address the complaints, including applying for a variance to the use permit to increase the number of trucks and decrease the number of trailers permitted on the property. There is no evidence, however, that appellant applied for such a variance at that time.

Again in 2004, the City received complaints regarding appellant's violations of its use permit by parking trucks on the public right of way, and thus issued a Notice of Violation on September 15, 2004.

In 2006, the City initiated weekly investigations of appellant following its receipt of "aggressive complaints" regarding the company's violations of the use permit. The City's investigation revealed that appellant was consistently parking as many as 30 of its vehicles on neighborhood streets adjacent to its property (sometimes blocking cross walks or fire hydrants), and that it consistently had between 40 to 50 trucks on its property in violation of the permit's 20-truck restriction. The City thus began to issue citations for the violations, which totaled $52,900 as of September 18, 2007.

In August 2006, appellant met with the City to discuss its proposed corrective steps for addressing the violations of its use permit. Following the meeting, the City agreed to a 30-day moratorium on its enforcement of the use permit, conditioned on appellant taking certain actions, including applying for modification of the

permit, meeting with neighbors, reducing the number of trucks on the property to 20, and refraining from parking its vehicles on adjacent streets. However, after warning appellant that the moratorium was set to expire in two days and that the corrective steps were not yet implemented, the City resumed issuing citations.

In November 2006, appellant applied for a use permit modification to increase the number of trucks and decrease the number of trailers permitted on the property. However, appellant twice failed to comply with the City's requirements for applying for such a modification, and its submission was ultimately rejected.

During this time, the City continued to observe and to receive complaints of appellant's violations of the use permit. Between August 2006 and June 2007, the City had notice of at least 24 incidents of appellant's use of adjacent streets for parking its vehicles. On four occasions, the City counted between 29 and 39 trucks parked on the streets. As such, the City's staff asked the Zoning Adjustments Board (ZAB) to address appellant's violations of the use permit, as well as possible remedies under the Berkeley Municipal Code (BMC), such as modification or revocation of the use permit. (BMC, § 23B.60.020.)

On June 28, 2007, ZAB held a hearing in the matter, receiving both oral and written testimony from individuals who included appellant's neighbors and the City's staff. Appellant did not appear or submit a response to the alleged violations and, following the

hearing, ZAB recommended that the City Council revoke the company's use permit.

On September 18, 2007, the City Council held a public hearing on the matter, at which it considered the administrative record and received testimony from, among others, appellant's district vice-president, Jeremy Frank, the City's supervisor of code enforcement, Gregory Daniels, and several of appellant's neighbors. During his testimony, Frank acknowledged and apologized for appellant's repeated violations of its use permit, and for its failure to implement steps to correct them in a timely fashion. Following the hearing, the City Council voted unanimously to revoke the use permit, finding that appellant's "apology at the September 18, 2007 public hearing does not negate its serious violations of Use Permit No. 7575 and is insufficient in light of the evidence which shows [appellant's] longstanding failure to comply with the use permit."

On October 19, 2007, appellant filed a complaint and petition for writ of mandate (the writ petition) against the City. The complaint contained causes of action for injunctive relief, declaratory relief and inverse condemnation.

On January 31, 2008, the trial court issued a tentative order denying the writ petition, which appellant failed to contest in a timely manner. Nonetheless, the next day, appellant appeared in court to challenge the order. The trial court declined to hear

appellant's challenge on the ground that the company failed to give formal notice of an intent to appear in accordance with California Rules of Court, rule 3.1308(a)(1). Accordingly, on February 7, 2008, the trial court adopted its tentative order denying the writ petition and entered judgment against appellant.

On February 8, 2008, appellant sought a stay of the judgment for 60 days to consider its options on appeal, which the trial court granted. Thereafter, on May 21, 2008, appellant filed for voluntary dismissal of the remaining causes of action for injunctive relief, declaratory relief and inverse condemnation. This appeal of the judgment denying appellant's writ petition followed.

DISCUSSION

On appeal, appellant challenges the trial court's denial of its writ petition. Appellant reasons that its due process rights were violated during the revocation process, that revocation of the use permit was unwarranted based upon the record as a whole, and that substantial evidence failed to support any of the factual findings that the trial court relied upon in affirming the revocation. We address each contention in turn.[2]

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2. In its responding brief, the City asks that we dismiss the appeal as untimely and for lack of jurisdiction. This court, however, has already ruled on the City's motion for dismissal of the appeal, which was denied on July 18, 2008. As such, we decline to revisit the issue.

Appendix A

I. Standard of Review.

In reviewing a decision of an administrative agency, the trial court exercises its independent judgment on the evidence presented in the administrative hearing and determines whether the weight of the evidence supports the agency's decision. (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817; *Malibu Mountains Recreation, Inc. v. County of Los Angeles* (1998) 67 Cal.App.4th 359, 369-370.) In doing so, the trial court must employ a "strong presumption of correctness" to the agency's findings. (*Fukuda, supra,* 20 Cal.4th at p. 817.) Further, the party challenging the agency's decision—in this case, appellant—bears the burden of proving that such findings were against the weight of the evidence. (*Ibid.*; see also *Breslin v. City and County of San Francisco* (2007) 146 Cal.App.4th 1064, 1077-1078 [*Breslin*] ["In the trial court, [appellants] had the burden of proof to show that the [agency's] decision was not supported by the weight of the evidence—that is, that the decision was not supported by the preponderance of the evidence."].)

In applying the independent judgment test, "[t]he findings of a board where formal hearings are held should and do come before the [trial] court [ ] with a strong presumption in their favor based primarily on the [rebuttable] presumption contained in section 1963, subsection 15, of the Code of Civil Procedure [currently Evidence Code section 664] 'That official duty has been regularly performed.' Obviously, considerable weight should be given to the findings of experienced

administrative bodies made after a full and formal hearing, especially in cases involving technical and scientific evidence." (*Fukuda, supra,* 20 Cal.4th at p. 812; see also *Mason v. Office of Admin. Hearings* (2001) 89 Cal.App.4th 1119, 1131.)

On appeal, we must determine whether the trial court's judgment is supported by substantial evidence. (*Fukuda, supra,* 20 Cal.4th at p. 824; see also *Yakov v. Board of Medical Examiners* (1968) 68 Cal.2d 67, 72-73 ["the question before this court turns upon whether the evidence reveals substantial support, contradicted or uncontradicted, for the trial court's conclusion that the weight of the evidence does not [support the agency's findings]"].) We thus must uphold the trial court's factual findings unless they "so lack evidentiary support that they are unreasonable. . . . [Citation.]" (*Breslin, supra,* 146 Cal.App.4th at p. 1078; see also *City of Rancho Cucamonga v. Regional Water Quality Control Bd .* (2006) 135 Cal.App.4th 1377, 1387.)

II. Did Appellant Receive Due Process?

Applying the standard of review set forth above, we first address appellant's claim that it did not receive due process from the City or the trial court during the proceedings to revoke its use permit.

With respect to the proceedings before the local agency, appellant suggests for the first time on appeal that the "factual circumstances [of the revocation process] raised some suspicions of an agenda or bias

against [it]. . . ." In particular, appellant relies upon two circumstances to argue that the administrative tribunal was not impartial—the fact that ZAB disregarded the recommendation of its staff that the use permit be modified rather than revoked, and that the City's Mayor commented negatively on appellant's nonattendance at the ZAB hearing before the City Council voted to revoke the permit.

We conclude that, by not challenging the City's revocation decision below on due process grounds, appellant has waived the right to do so here. (*Southern Cal. Underground Contractors, Inc. v. City of San Diego* (2003) 108 Cal.App.4th 533, 549 ["an issue not raised at an administrative hearing, including a claim of bias, may not be raised in later judicial proceedings"].) Moreover, even were we to disregard this waiver, we would find no violation of due process in the administrative proceedings on this record. Procedural due process in an administrative setting requires notice and the right to appear before a "reasonably impartial, noninvolved reviewer." (*Gai v. City of Selma* (1998) 68 Cal.App.4th 213, 219; see also *Korean American Legal Advocacy Foundation v. City of Los Angeles* (1994) 23 Cal.App.4th 376, 391 fn. 5 [*Korean American*].) Here, appellant undoubtedly had notice that the administrative agency was considering revoking its use permit. After several years of citing appellant for repeated violations of the use permit, the City issued a public notice on June 14, 2007 that a public hearing would be held before ZAB on June 28, 2007 "to consider recommendation to City Council as to whether the

U-Haul business at 2100 San Pablo Avenue is in violation of Use Permit # 7575 under BMC 23B.60.020." BMC 23B.60.020 expressly provides for a decision to "revoke or modify the permit" if certain conditions (which are discussed in great detail below) are met. Under these circumstances, we reject appellant's claim that proper notice was lacking.

We likewise reject the claim that the City's disregard of a recommendation by ZAB staff to modify the use permit or the Mayor's comment on appellant's nonattendance at the hearing rendered the revocation process fundamentally unfair. First, as appellant admits, a staff recommendation is not binding on an administrative agency, particularly where, as here, the agency provided detailed reasons on the record why such recommendation should not be followed. (Cf. *Bam, Inc. v. Board of Police Comrs.* (1992) 7 Cal.App.4th 1343, 1348-1349 [reversing the trial court's denial of a writ of mandate directing the Board to vacate an order suspending a use permit where, in so ordering, the Board rejected a staff recommendation not to revoke the permit despite the lack of any evidence supporting suspension or revocation].) Indeed, both the City Council and ZAB staff agreed in this case that appellant had violated the terms and conditions of its use permit; their only disagreement was over the appropriate remedy to order pursuant to BMC section 23B.60.020.

Second, there must be actual bias, not as here the mere suggestion of bias, to render a hearing before a disinterested tribunal unfair. (*Southern Cal.*

Underground Contractors, supra, 108 Cal.App.4th at p. 549 ["a party claiming that the decision maker was biased must show actual bias, rather than the appearance of bias, to establish a fair hearing violation"]; *ibid.* ["Bias in an administrative hearing context can never be implied, and the mere suggestion or appearance of bias is not sufficient."].) Here, the City's Mayor, like other City Council members, was justifiably concerned about appellant's failure to attend the hearing to address its alleged violations of the use permit. This concern, however, does not indicate the tribunal was actually biased against appellant, much less that it failed to provide appellant with a fair hearing on the matter.

With respect to the trial court proceedings, appellant claims that the absence of a hearing on its writ petition deprived it of due process. Referring to language in Code of Civil Procedure section 1094.5, subdivision (a) that "the case shall be heard by the court," appellant claims it had a right to such hearing. We disagree.

In declining appellant's untimely request to argue against adoption of the tentative order denying the writ petition, the trial court relied upon California Rules of Court, rule 3.1308(a)(1) (rule 3.1308(a)(1)) and Alameda County Superior Court Local Rule 3.30, subdivision (c) (local rule 3.30(c)). Rule 3.1308(a)(1), which Alameda County Superior Court has adopted pursuant to local rule 3.30(c), provides: "The court must make its tentative ruling available by telephone and also, at the option of

the court, by any other method designated by the court, by no later than 3:00 p.m. the court day before the scheduled hearing. If the court desires oral argument, the tentative ruling must so direct. The tentative ruling may also note any issues on which the court wishes the parties to provide further argument. *If the court has not directed argument, oral argument must be permitted only if a party notifies all other parties and the court by 4:00 p.m. on the court day before the hearing of the party's intention to appear.* A party must notify all other parties by telephone or in person. The court must accept notice by telephone and, at its discretion, may also designate alternative methods by which a party may notify the court of the party's intention to appear. The tentative ruling will become the ruling of the court if the court has not directed oral argument by its tentative ruling and notice of intent to appear has not been given."[3] (See also California Rules

3. Local rule 3.30(c) provides: "The court has adopted the tentative ruling procedure set out in California Rules of Court, rule 3.1308(a)(1). Prior to the hearing of a law and motion matter, a tentative ruling or indication that the parties are to appear will be issued. The tentative ruling will be available by 4:00 p.m. two court days prior to the scheduled hearing. The tentative ruling may direct the parties to appear for oral argument and may specify the issues on which the court requests the parties to provide further argument. The tentative ruling may be obtained by calling the department's tentative ruling number or by accessing the court's website. The telephone number for the department and the court's website will be provided in the Notice of Assignment. Whenever a tentative ruling has not been issued, the parties are to appear at the hearing unless otherwise ordered."

of Court, rule 3.1103(a)(2) [defining "a law and motion proceeding" to include "[an] application for an order regarding . . . writs of . . . mandate"].)

Here, pursuant to these rules, the trial court made a tentative order on the writ petition based upon the written submissions without directing the parties to appear for further argument. Appellant thereafter failed to "notif [y] all other parties and the court by 4:00 p.m. on the court day before the hearing of the party's intention to appear." (Rule 3.1308(a)(1); see also local rule 3.30(c).) As such, the trial court properly denied appellant the opportunity to argue the matter when appellant nonetheless appeared unannounced before the court the next day. Given the legal basis for the trial court's action, we cannot conclude appellant's due process rights were violated in this regard.[4]

4. In concluding that no due process violation occurred, we further reject appellant's suggestion that the trial court judge was biased against it as evidenced by the fact that "he had lived four blocks from the property and . . . had concluded that [appellant] was 'abus[ing] everybody.' " In raising this issue, appellant takes the trial court judge's statements out of context. While the judge indeed acknowledged living four blocks from the property for about 17 years, he then added "that was a long time ago . . ." The judge also stated: "I know that business has been there. But that really has very little to do with a City's decision to revoke a permit based on the activities of the business. No matter how long you've been there you still can't abuse everybody. And the standard that I used, which was the independent judgment test, resulted in the tentative ruling." Considered in the proper context, the judge's

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III. Was Revocation of the Use Permit Warranted?

We next address appellant's claim that the record, viewed as a whole, was insufficient to justify revocation of the company's 30-year-old use permit.

Citing BMC section 23B.60.020, the trial court found that the "City Council may revoke a use permit if it finds that either (1) the holder of the permit has failed to comply with one or more of the conditions set forth therein; or (2) the permitted use has been substantially expanded or changed in character beyond that set forth in the permit." The trial court then affirmed the City Council's decision to revoke appellant's permit under both prongs of BMC section 23B.60.020. In doing so, the trial court relied upon four findings of fact. First, the use permit limited appellant to "approximately 20 trucks and 30 trailers" on the property at any given time, which limit appellant exceeded by "a wide margin." Second, appellant used public rights of way for staging activities, and "failed to respond meaningfully to Respondent's unequivocal notices that the [use permit] did not permit public staging, going back to at least 1997." Third, the record reflected a pattern of persistent complaints that appellant's improper staging activities

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statements accurately reflect the law regarding permit revocation, not, as appellant suggests, actual bias. Had appellant believed otherwise, the legal recourse was to file a motion to disqualify the judge pursuant to Code of Civil Procedure section 170 .3, subdivision (c)(1), *before* entry of the judgment against it.

were detrimental to the neighborhood, which, by its terms, subjected the use permit to review, revocation or modification. And fourth, appellant had no right under the use permit to expand its operations beyond its own premises and onto adjacent property.

On appeal, appellant disputes that BMC section 23B.60.020 provides the relevant standard for deciding whether revocation of its use permit was proper. Rather, appellant argues that, "[t]o justify interference with the constitutional right to carry on a lawful business, the following must be clearly established: (1) the public's interest requires such interference; (2) the means employed are reasonably necessary to accomplish the purpose; and (3) the means employed are not unduly oppressive on individuals. *Korean Am. Legal Adv. Found. v. City of Los Angeles*, 23 Cal.App.4th 376, 390 n. 5 (1994)."

We disagree with appellant's statement of the applicable standard. The appellate court in *Korean American*, indeed held that a municipality's power to revoke a conditional use permit is limited, but not necessarily in the manner appellant suggests. First, the court noted that, if the permittee has incurred substantial expense and acted in reliance on the permit, the permittee has a vested interest in the property and thus is entitled to the protections of due process prior to the permit's revocation. (*Korean American, supra*, 23 Cal.App.4th at pp. 391-392 fn. 5.) The court then continued: " 'When a permittee has acquired such a vested right it may be revoked *if the permittee fails to*

comply with reasonable terms or conditions expressed in the permit granted [citations] or if there is a compelling public necessity, [Citations.] (*O'Hagen v. Board of Zoning Adjustment* (1971) 19 Cal.App.3d 151, 157 [96 Cal.Rptr. 484].)' A compelling public necessity warranting the revocation of a use permit for a lawful business may exist if the conduct of a business as a matter of fact constitutes a nuisance and the permittee refuses to comply with reasonable conditions to abate the nuisance. *In these circumstances,* a municipality has the authority to remove such a business under its police power to prohibit and enjoin nuisances. [Citation.] However, in order to justify the interference with the constitutional right to carry on a lawful business it must be clear the public interests require such interference and that the means employed are reasonably necessary to accomplish the purpose and not unduly oppressive on individuals. (*Lawton v. Steele* (1894) 152 U.S. 133, 137 [38 L.Ed. 385, 388, 14 S.Ct. 499]; *Leppo v. City of Petaluma* (1971) 20 Cal.App.3d 711, 717 [97 Cal.Rptr. 840].)" (*Korean American, supra,* 23 Cal.App.4th at pp. 391-392 fn. 5 [emphasis added].)

Interpreting this language in *Korean American,* we conclude two distinct grounds exist for revoking a use permit: (1) if the permittee fails to comply with reasonable terms or conditions expressed in the permit, *or* (2) if there is a compelling public necessity such as a nuisance. (*Korean American, supra,* 23 Cal.App.4th at pp. 391-392 fn. 5.) Moreover, the three requirements upon which appellant relies—that the public interest require municipal interference, that the means

employed are reasonably necessary to accomplish the purpose, and that the means employed are not unduly oppressive—relate to the second ground (the existence of a compelling public necessity) rather than to the first ground (the failure to comply with the permit's reasonable terms or conditions). (*Ibid.* See also *Trans-Oceanic Oil Corp. v. Santa Barbara* (1948) 85 Cal.App.2d 776, 783 [a municipality may properly exercise its police power to revoke a use permit where the permittee fails to comply with the permit's conditions of use and existing zoning regulations.)

Applying this standard to this case, the City revoked appellant's use permit, not upon a showing of a compelling public necessity, but rather pursuant to BMC section 23B.60.020 after finding appellant had repeatedly failed to comply with certain of the permit's terms and conditions and had substantially expanded its use. Appellant has made no claim that the permit's terms and conditions were unreasonable, nor is there any doubt that, as discussed above, appellant received due process before the permit was revoked. As such, so long as substantial evidence established appellant's noncompliance with or substantial expansion of the permitted use, revocation of the permit was justified. (*Korean American, supra,* 23 Cal.App.4th at pp. 391-392 fn. 5; *Trans-Oceanic Oil, supra,* 85 Cal.App.2d at p. 783. Cf. *O'Hagen, supra,* 19 Cal.App.3d at pp. 159-160; *City of San Marino v. Roman Catholic Archbishop* (1960) 180 Cal.App.2d 657, 670 ["The facts constituting proof of an actual breach of conditions or of a clearly stated intention not to comply with the terms of a lawfully

issued permit may only be determined upon a proper hearing before a duly constituted body. Until such time as these facts are presented to a proper tribunal of the city and that body has acted upon them, no valid revocation can be accomplished."].) We thus turn to the relevant evidence.

IV. Does Substantial Evidence Support the Trial Court's Findings?

As we just explained, the trial court found substantial evidence supported the City's decision to revoke appellant's use permit pursuant to BMC section 23B.60.020 because (1) appellant failed to comply with one or more of the conditions set forth in the permit; and (2) appellant substantially expanded the permitted use in a manner beyond that set forth in the permit. We agree.

BMC section 23B.56.010 provides that "[a]ny approval permits only those uses and activities actually proposed in the application and excludes other uses and activities." Consistent with this provision, appellant's use permit set forth as a general condition that "the plans submitted with the application shall be followed and that all of the assurances and commitments contained in the original application shall be met except as they may be modified by the special conditions listed below." In addition, the use permit set forth as a specific condition that "the use permit shall be subject to review, attaching of additional conditions, or revocation if persistent complaints are received that the operation is detrimental to the neighborhood."

Appendix A

Here, undisputedly, appellant's use permit application did not propose to use public areas adjacent to the property for conducting the company's business operations. Nonetheless, there is ample evidence in the record that appellant did just that, resulting in persistent complaints from neighbors concerned about the welfare of their neighborhood.

In particular, the record proves that the City first issued appellant a Notice and Order to Correct in 1997 after receiving complaints from neighbors regarding the company's use of public streets for parking its vehicles. This first notice expressly warned appellant that all uses granted pursuant to the permit were "ON THE PROPERTY ONLY," and that violations of such restriction could lead to review and revocation of the permit. While there was evidence that complaints from neighbors regarding appellant's use of adjacent public property "sort of subsided" after the 1997 notice, the City issued a similar warning in June 2000 when such complaints resurfaced.

In 2004, the City received even more complaints regarding appellant's violations of the use permit by parking its trucks on the public right of way, leading the City to issue a Notice of Violation on September 15, 2004. Then, in 2006, the City began an investigation into appellant's operations after receiving "aggressive complaints" regarding the company's continued permit violations. During that investigation, the City discovered appellant was consistently parking as many as 30 of its vehicles on neighborhood streets adjacent to its

property, sometimes blocking cross walks and fire hydrants. Citations for these and other violations totaled $52,900 as of September 18, 2007.

Confronted with this evidence of recurring permit violations and persistent complaints, appellant argues that "nearly all of these vehicles [on the adjacent public streets] were parked by returning customers," and, thus, that the company was not responsible for it. We disagree. Ample evidence exists that appellant, not just its customers, parked the vehicles on the neighborhood streets. For example, the record reflects that appellant's employees were observed on numerous occasions storing or servicing its vehicles or even driving them recklessly on the adjacent public streets. Moreover, even if some of the vehicles parked on the adjacent streets were left by returning customers, it does not follow that appellant bears no responsibility. As a hearing officer observed after reviewing one of appellant's many citations, "it is a foreseeably cyclical, if not constant, result of [appellant's] conceded inability to absorb rental returns on its own lot" that led customers to park appellant's vehicles on adjacent public streets. Further, appellant "benefit[ted] from the volume of vehicles rented while at the same time operationally allowing rental vehicles to be frequently parked on the street[s]." As such, we reject appellant's attempts to shirk responsibility for using public rights of way for parking its vehicles.

We likewise reject appellant's argument that it "solved this problem" years before the City's decision

to revoke its use permit. In doing so, we acknowledge the evidence in the record that appellant considered certain corrective measures, such as opening a new facility in a nearby city with more parking and insisting that customers renting at the Berkeley facility return the vehicles elsewhere. However, there is no evidence that appellant in fact implemented each of the proposed corrective measures. Rather, the record reflects that, in August 2006, appellant met with the City to discuss proposed steps for addressing the violations of its use permit. The City thereafter agreed to a 30-day moratorium on its enforcement of the use permit, conditioned on appellant taking certain actions, including meeting with neighbors and stopping the parking of its vehicles on adjacent streets. However, after warning appellant that the moratorium was set to expire in two days and that the corrective steps were not yet implemented, the City resumed issuing citations. Thereafter, between August 2006 and June 2007, the City noted at least 24 incidents of appellant's use of adjacent streets for parking its vehicles, including four incidents in which the City counted between 29 and 39 trucks parked on the streets.

This evidence mirrors testimony received by the City Council at the revocation hearing from appellant's district vice-president, Jeremy Frank, who acknowledged that "some of the previous people in the president position . . . did make promises to the City to . . . make changes, and then failed to communicate to the proper people . . . [who] could make those changes. . . . And unfortunately, I can do nothing but apologize

profusely and say that . . . this just completely . . . escaped my attention." In addition, the City Council heard testimony from a City staff member who had in recent days observed eight of appellant's trucks parked on adjacent streets.

The evidence set forth above, we conclude, is sufficient to support the trial court's findings that appellant used public rights of way for staging, and thereby expanded its business operations beyond the property in a manner contrary to the terms and conditions of the use permit. The evidence is likewise sufficient to support the trial court's findings that appellant's neighbors, for several years, had persistently complained to the City regarding appellant's public staging, and that appellant failed to respond meaningfully to the City's "unequivocal notices" that the use permit did not permit such staging. Accordingly, we conclude, like the trial court, that the City was authorized under both California common law and BMC section 23B.60.020 to revoke appellant's use permit. (*Korean American, supra,* 23 Cal.App.4th at pp. 391-392 fn. 5; *Trans-Oceanic Oil, supra,* 85 Cal.App.2d at p. 783.)

In reaching this conclusion, we acknowledge appellant's additional argument that the trial court erred in finding that the use permit contained an enforceable term limiting appellant to 20 trucks on the property, and in finding that the City is not collaterally estopped by a hearing officer's decision that any such term was too vague to be enforced. Regardless of

whether appellant further violated the use permit by having more than 20 trucks on the property, for all the reasons stated above the City was authorized to revoke the use permit under the applicable law.[5]

---

5. Appellant admits that its use permit application proposed to use the property for "[a]pproximately 20 Rental Trucks and 30 Rental Trailers," and that the actual permit provided that "the plans submitted with the application shall be followed and that all of the assurances and commitments contained in the original application shall be met except as they may be modified by the special conditions listed below." Appellant claims, however, the phrase "approximately 20 trucks and 30 trailers" is ambiguous and should thus be interpreted to allow use of the property for a total of approximately 50 vehicles, irrespective of whether the vehicles are trucks or trailers. A hearing officer agreed with appellant's claim when deciding the validity of one particular citation issued against appellant in 2006. The trial court, however, rejected appellant's subsequent claim that the hearing officer's decision had a collateral estoppel effect in this litigation on the ground that the City lacked an adequate opportunity to litigate the issue. As explained above, we need not decide for purposes of this appeal whether the trial court's decision in this regard was correct.

Appendix A

DISPOSITION

The judgment denying appellant's petition for writ of mandate is affirmed.

_____
Jenkins, J.

We concur:

_____
McGuiness, P. J.

_____
Pollak, J.

APPENDIX B — ORDER OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA DATED JANUARY 31, 2008

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ALAMEDA
RENE C. DAVIDSON
ALAMEDA COUNTY COURTHOUSE

No. RG07352204

U-Haul Company Of California

Plaintiff/Petitioner(s)

vs.

City of Berkeley

Defendant/Respondent(s)

(Abbreviated Title)

Order

Petition for Writ Denied

The Petition for Writ was set for hearing on 01/31/2008 at 09:00 AM in Department 31 before the Honorable Frank Roesch. The Tentative Ruling was published and has not been contested.

Appendix B

IT IS HEREBY ORDERED THAT:

The tentative ruling is affirmed as follows: The Petition Of U-Haul Company Of California ("PETITIONER") is DENIED. The findings of Berkeley City Council's Resolution No. 63,842-N.S., revoking and terminating Use Permit No. 7575 (the "UP") are supported by the weight of the evidence.

Respondent City of Berkeley's City Council may revoke a use permit if it finds that either (1) the holder of the permit has failed to comply with one or more of the conditions set forth therein; or (2) the permitted use has been substantially expanded or changed in character beyond that set forth in the permit. (BMC 23B.60.020.) The City Council found both and both findings are supported by the Administrative Record ("AR").

First, the UP includes a limit of "approximately 20 trucks and 30 trailers." This limitation is not so vague as to be unenforceable. Petitioner admitted to Respondent that Petitioner understood the UP to impose such limits and that Petitioner would endeavor to operate within those limits and/or obtain a modification of the UP. (AR 50, 54, 67, 75, 429.) The City Counsel's conclusion that Petitioner exceeded this limitation by a wide margin is supported by evidence that Petitioner parked 50 trucks on its property and parked many additional vehicles on the street. (AR 7-9, 16-17, 94.) Respondent is not collaterally estopped by the Hearing Officer's dismissal of the 2006 parking citation issued to Petitioner, which Respondent did not have standing to appeal. (See, e.g., Rest.2d Judgments, § 28(1), p. 273.)

Second, the UP does not expressly authorize Petitioner to use public property for staging its equipment. Uses not expressly allowed in a use permit are not authorized by that permit. (BMC 23B.56.010.) Outdoor uses are not permitted unless District regulations authorize them expressly and any required permit is obtained; this includes, but is not limited to, the outside storage of goods, containers and/or materials. (BMC 23E.16.020) Also, the UP assumes that staging would take place on Petitioner's property, and not on public streets or sidewalks, because it included landscaping and design measures intended to screen Petitioner's staging activities from the public. (AR 36-37, 46.) Petitioner used public rights of way for staging, and failed to respond meaningfully to Respondent's unequivocal notices that the UP did not permit public staging, going back to at least 1997. (See, e.g., AR 46-47.)

Third, the UP states that "the use permit shall be subject to review, attaching or additional conditions, or revocation if persistent complaints are received that the operation is detrimental to the neighborhood." (AR 36.) The administrative record does reflect a pattern of community complaints that Petitioner's street staging has adversely impacted the surrounding neighborhood. (AR 9-10, 243-36.)

Fourth, even if Petitioner may have a vested right to expand its business, Petitioner is not entitled to expand its operations beyond its own premises and onto adjacent public property. For all of the above-stated reasons, the Petition is DENIED.

Appendix B

Dated: 01/31/2008

s/ Judge Frank Roesch
Judge Frank Roesch

APPENDIX C — ZONING ADJUSTMENTS BOARD RESOLUTION NO. 07-02 DATED JULY 10, 2007

ZONING ADJUSTMENTS BOARD RESOLUTION NO. 07-02

RECOMMENDING THAT THE CITY COUNCIL, AFTER HEARING, (1) FIND THAT THE BUSINESS AT 2100 SAN PABLO AVENUE KNOWN AS "U-HAUL OF CALIFORNIA", IS IN VIOLATION OF USE PERMIT #7575, AND (2) REVOKE THAT USE PERMIT AND ORDER ITS TERMINATION

Whereas on June 28, 2007, the Zoning Adjustments Board held a duly noticed public hearing as required by Berkeley Municipal Code section 23B.60.030; and

Whereas the Zoning Adjustments Board has considered the staff report submitted for the hearing, as well as all of the evidence and testimony submitted at the public hearing.

NOW THEREFORE, BE IT RESOLVED, that the Zoning Adjustments Board recommends that the City Council find and determine as follows:

1. The following are conditions of Use Permit #7575:

    - No more than 20 trucks and 30 trailers are allowed on the lot at any time.

    - No vehicles of equipment shall be staged, stored, repaired or maintained in the public right of way at anytime.

Appendix C

- The hours of operation are 8:00 am to 7:00 pm daily.

- Four off-street parking spaces shall be provided for customers at all times.

- U-Haul shall comply with all Use Permit #7575 Design Review Conditions no later than 30 days from issuance of the Council's decision; and

2. The permitted use has been substantially expanded or changed in character beyond that set forth in Use Permit #7575;

3. The U-Haul business at 2100 San Pablo is and has been operating in violation of Use Permit #7575 based on the evidence in the report.

4. That the City Council, after hearing, revoke Use Permit #7575 for U-Haul of California, at 2100 San Pablo Avenue for the reasons set forth above, and enjoin and terminate the existing use.

s/ Debra R. Sanderson
Debra R. Sanderson,
Secretary,
Zoning Adjustments
Board

July 10, 2007
Date

APPENDIX D — CITY COUNCIL REVOCATION DATED OCTOBER 9, 2007

CONSENT CALENDAR
October 9, 2007

To: Honorable Mayor and Members of the City Council

From: Phil Kamlarz, City Manager

Submitted by: Sarah Reynoso, Deputy City Attorney*

Subject: Adoption of Findings – U-Haul Company, 2100 San Pablo Avenue

RECOMMENDATION

Adopt a resolution, including findings, that U-Haul, located at 2100 San Pablo Avenue, violated Use Permit No. 7575 and said permit is revoked and terminated, as previously determined by the City Council on September 18, 2007, after a public hearing.

FISCAL IMPACTS OF RECOMMENDATION

None. Existing staff costs of enforcement are already budgeted.

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* This report is submitted by Sarah Reynoso, Deputy City Attorney, because Zach Cowan, Assistant City Attorney, had a conflict of interest in this matter and the City Attorney was not present at the September 18, 2007 public hearing.

Appendix D

CURRENT SITUATION AND BACKGROUND

On September 18, 2007, the Council conducted a hearing upon the recommendation of the Zoning Adjustments Board ("ZAB") pursuant to Berkeley Municipal Code ("BMC") Chapter 23B.60, that U-Haul be found to have violated Use Permit No. 7575 and said permit be revoked and terminated. The Council concluded that the overwhelming weight of evidence supported the ZAB's recommendation. This report forwards the proposed findings and related order necessary under BMC Chapter 23B.60 when the Council revokes or terminates a use permit following public hearing.

RATIONALE FOR RECOMMENDATION

This resolution embodies the Council's action of September 18, 2007.

ALTERNATIVE ACTIONS CONSIDERED

None were considered in light of the Council's action on September 18, 2007.

CONTACT PERSON

Sarah Reynoso, Deputy City Attorney, 981-6950

Attachment

1. Resolution

Appendix D

RESOLUTION NO.

REVOKING AND TERMINATING USE PERMIT NO. 7575 ISSUED TO U-HAUL COMPANY, LOCATED AT 2100 SAN PABLO AVENUE, FOR VIOLATING THE TERMS OF THE USE PERMIT

WHEREAS, the U-Haul Company (hereafter "U-Haul") is a truck and trailer rental business located at 2100 San Pablo Avenue, in Berkeley, California, in the West Berkeley Commercial District of South Berkeley; and

WHEREAS, U-Haul has been in operation since July 1975; and

WHEREAS, U-Haul International, Inc. in Phoenix Arizona owns the property and Jeff Singleton, U-Haul Marketing Company President, and U-Haul Company of West Sacramento operate the business; and

WHEREAS, in May 1975, U-Haul submitted a use permit application and site plan that stated that there would be approximately twenty trucks and thirty trailers stored on the site, the hours of operation would be 8:00 a.m. to 7:00 p.m. and there would be four off-street parking spots on the U-Haul lot; and

WHEREAS, in June 1975, the Zoning Adjustments Board (hereafter "Board") granted U-Haul Use Permit No. 7575 based on its application that the use will include approximately twenty trucks and thirty trailers; and

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WHEREAS, in September 1975 the City conducted an inspection and determined that U-Haul had constructed a building partially in the right of way. The City ordered U-Haul to submit an application for a revocable encroachment permit, which was granted by City Council Resolution No. 47,702-N.S.; and

WHEREAS, since 1997 U-Haul has repeatedly violated the conditions of Use Permit No. 7575 by greatly exceeding the number of trucks allowed on the property and using the public right of way to store additional vehicles; and

WHEREAS, in September 1997, the Zoning Compliance Officer issued U-Haul a *First Notice and Order to Correct*, in which U-Haul was specially warned that Use Permit No. 7575 allowed staging on the property only and that it was in violation of eight design review conditions placed on Use Permit No. 7575. In October 1997, U-Haul submitted a written response to the *First Notice* stating that (a) incoming trucks and trailers would be referred to the new Emeryville dealership when the Berkeley location is full; (b) premiums would be increased on one-way rentals; and (c) customers renting from Berkeley would be referred to other locations for returns; and

WHEREAS, on May 17, 2000, the City received a complaint from a neighborhood resident that U-Haul was using Addison Street, Tenth Street and Allston Way to store its vans. The resident complained to U-Haul and was told by U-Haul it had no room on its lot to store all the vehicles; and

Appendix D

WHEREAS, on June 14, 2000, in response to the May 17, 2000 citizen complaint, Code Enforcement Officer Maurice Norrise contacted U-Haul Assistant Manager Randy Hessler regarding the complaint and on June 16, 2000 issued U-Haul a *Courtesy Follow Up Notice* notifying U-Haul that it was unlawfully using the public right of way to store vehicles; and

WHEREAS, on August 21, 2000 the Code Enforcement Officer issued a criminal citation to Randy Hessler for illegally parking U-Haul trucks in the public right of way; and

WHEREAS, on September 14, 2000, Code Enforcement received a letter from Jim Buell, U-Haul Marketing Company President, stating that U-Haul would comply with its use permit in part, that all trucks parked by customers in the public right of way after hours would be removed by 10:00 a.m. the next day, and that U-Haul would apply for a variance to reduce the number of trailers and increase the number of trucks. However, U-Haul never filed any such application; and

WHEREAS, on August 23, 2004, in response to community complaints, Code Enforcement Officer Roy Phelps contacted Jeff Singleton, the new U-Haul Marketing Company President, regarding U-Haul's violating the conditions of the use permit by parking its trucks in the public right of way; and

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WHEREAS, on September 15, 2004, the Code Enforcement Officer Roy Phelps issued a *Notice of Violation* to U-Haul manager Emerson Payumo because U-Haul continued to park its trucks in the public right of way despite prior warnings; and

WHEREAS, in May 2006, neighbors again complained that U-Haul was parking trucks on the street and blocking driveways. During the period from May 2006 and June 2006, Code Enforcement Officer Roy Phelps monitored U-Haul activity and warned U-Haul Manager Mike Neville that he would be cited if U-Haul continued to park trucks in the public right of way; and

WHEREAS, on June 13, 2006, after repeated inspections and warnings, the Code Enforcement Officer issued a $500 administrative citation (No. 0023) to U-Haul Manager Mike Neville for parking trucks on the public right of way. U-Haul did not appeal administrative citation No. 0023 and the $500 penalty was paid on August 31, 2006; and

WHEREAS, on August 23, 2006, Code Enforcement staff met with Jeff Singleton regarding U-Haul's unlawful practice of parking its trucks on the public right of way, and during this meeting staff pointed out to Mr. Singleton that the site plan posted in U-Haul's office was in violation of Use Permit No. 7575 because it showed U-Haul storing fifty trucks on the lot; and

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WHEREAS, at the August 23, 2006 meeting with Mr. Singleton, Code Enforcement staff gave Mr. Singleton a 30-day moratorium on further enforcement action and advised Mr. Singleton to do all the following: (1) submit an application to modify the current use permit; (2) schedule a meeting with the surrounding residential and commercial neighbors to discuss current and previous community concerns; (3) do not park U-Haul trucks on the public right of way; and (4) reduce the number of trucks on the lot to 20 trucks; and

WHEREAS, on September 21, 2006, Code Enforcement delivered to U-Haul Field Relief Manager Adam Craig a written notice for Mike Neville and Jeff Singleton that advised the City's 30-day moratorium on enforcement would expire on September 23, 2006, warned U-Haul that it must reduce the number of trucks it had on the lot (fifty-one at that time) to no more than twenty trucks, and requested that Mr. Neville or Mr. Singleton contact the Planning Department regarding their use permit violations; and

WHEREAS, on October 5, 2006, Code Enforcement Supervisor Gregory Daniel issued a citation warning letter to Mike Neville and Jeff Singleton in which he chronicled U-Haul's repeated violations of Use Permit No. 7575 and warned that because of U-Haul's history of non-compliance with the use permit that U-Haul would be cited for all violations to the full extent allowed under law; and

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WHEREAS, on November 16, 2006, U-Haul submitted by facsimile an application to modify Use Permit No. 7575 which was incomplete as it did not include the requisite fees, applicant statement, site photographs, vicinity map, site plan or the Zoning Use questionnaire and it did not comply with Planning Department procedures because facsimile applications are not accepted. On December 13, 2006, staff issued U-Haul a letter advising it that the modification application was incomplete and giving it ten days to file a completed application. U-Haul never completed the application; and

WHEREAS, on February 20, 2007, Peter Onken of U-Haul Company of West Sacramento, submitted another application to modify Use Permit No. 7575. Staff again determined that the application was incomplete in that it failed to address at least fourteen substantive issues regarding U-Haul's operation. On March 16, 2007 staff notified U-Haul its application was incomplete. U-Haul never responded nor submitted a revised application; and

WHEREAS, Code Enforcement has issued U-Haul nine separate citations between June 13, 2004 and February 13, 2007 for violations of Berkeley Municipal Code (BMC) 23B.56.010A, which prohibits any use or activity not proposed in the use application and BMC 23B.56.020A.8, which requires a modification for any change that expands, intensifies or substantially changes the use; and

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WHEREAS, on August 21, 2006 Code Enforcement issued U-Haul Administrative Citation No. 0046 for violation of BMC Section 23B.56.020.A.8 for parking thirty-two (32) U-Haul trucks in the public right of way. The penalty was $200 per truck for a total citation of $6400. The citation was upheld on appeal to the City's administrative hearing officer, but has been appealed by U-Haul to the Alameda County Superior Court; and

WHEREAS, on September 25, 2006, Code Enforcement issued U-Haul Administrative Citation No. 0025 for violation of BMC Section 23B.56.020.A.8 for parking twenty-three (23) excess trucks on the U-Haul lot and imposed a penalty of $100 for each excess truck for a total citation of $2,300. U-Haul failed to appeal the citation and the penalty remains outstanding; and

WHEREAS, on October 2, 2006, Code Enforcement issued U-Haul Administrative Citation Nos. 2390 and 0049 for violations of BMC Section 23B.56.020.A.8. Citation No. 2390 was issued to U-Haul for parking two (2) U-Haul trucks in the public right of way. The penalty imposed was $300 for each truck parked in the right of way for a total penalty of $600. Citation No. 0049 was issued to U-Haul for the twenty (20) excess trucks it had parked on the U-Haul lot. The citation imposed a $200 per truck penalty for each truck in excess of the 20 allowed under the use permit, for a total penalty of $4,000. U-Haul failed to appeal either citation and the penalties remain outstanding; and

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WHEREAS, on October 11, 2006, Code Enforcement issued Administrative Citation No. 2391 for violations of BMC Sections 23B.56.010.A, 23B.56.020.A.8, 23B.56.030, and 23B.56.040 for parking 38 excess trucks on the U-Haul lot. The citation imposed a $100 per truck penalty for each truck in excess of the 20 allowed under the use permit, for a total penalty of $15,200. U-Haul failed to appeal the citation and the penalty remains outstanding; and

WHEREAS, on October 11, 2006, Code Enforcement also issued Administrative Citation No. 2392 for violation of BMC Section 23B.56.020.A.8 for parking two (2) U-Haul trucks in the public right of way. The penalty was $200 per truck for a total penalty of $400. U-Haul failed to appeal the citation and the penalty remains outstanding; and

WHEREAS, on November 3, 2006 Code Enforcement issued Administrative Citation No. 2651 for parking twenty-seven (27) excess trucks on the U-Haul parking lot. The citation imposed a penalty of $200 for each truck in excess of the 20 allowed under the use permit, for a total penalty of $21,600; and

WHEREAS, on November 15, 2006, U-Haul Marketing President Jeff Singleton filed an appeal of Administrative Citations No. 0046 and 2651. U-Haul argued that citation No. 0046 should be dismissed because the City could not regulate U-Haul's use of the public right of way. U-Haul also argued that citation No. 2651 should be dismissed because Use Permit

No. 7575 was vague and unenforceable because the application stated "approximately 20 rental trucks and 30 rental trailers" would be stored on the U-Haul lot. The hearing officer upheld citation No. 0046 but overturned citation No. 2651 on the ground that she found the use permit to be ambiguous and insufficiently detailed; and

WHEREAS, on February 13, 2007, Code Enforcement issued U-Haul Manager Mike Neville Administrative Citation No. 2394 for illegal dumping, under BMC 12.40.080. The penalty was $1,500, which was not appealed by U-Haul and was paid on March 15, 2007; and

WHEREAS, U-Haul appealed to the Alameda County Superior Court the City's Administrative Hearing Officer's decision on citation No. 0046 and has argued that it is not violating Use Permit No. 7575 by expanding its business beyond the property line to the public right of way. Trial is set on this matter for October 15, 2007; and

WHEREAS, on June 28, 2007, based upon U-Haul's numerous violations of Use Permit No. 7575, the Zoning Adjustments Board held a duly noticed meeting as required by BMC Section 23B.60.020 to determine whether to recommend to the City Council whether U-Haul is in violation of Use Permit No. 7575 and if so, the appropriate remedy; and

WHEREAS, no representative of U-Haul attended the Zoning Adjustment Board's hearing, nor did U-Haul submit any written statement; and

WHEREAS, upon conclusion of the hearing the Zoning Adjustments Board adopted Resolution No. 07-02 and recommended that the City Council revoke Use Permit No. 7575; and

WHEREAS, on September 18, 2007, the City Council held a duly noticed public hearing to consider the recommendation of the Zoning Adjustment Board and any other evidence that the public or concerned parties wished to present; and

WHEREAS, on July 25, 2007, the City Clerk sent to Mike Neville, U-Haul Company Berkeley, Tom Tollison, U-Haul International, Inc., Jeff Singleton, President, U-Haul Marketing Co., and Damien P. Lillis, U-Haul's legal counsel, a letter notifying them of the public hearing, as required by law, and of the procedure that would be followed at the September 18 hearing; and

WHEREAS, Jeremy Frank, U-Haul District Vice President, attended the Council hearing and submitted additional documents. Mr. Frank did not dispute U-Haul's violations of Use Permit No. 7575, and instead specifically acknowledged that the City could regulate U-Haul's use of the public right of way and apologized for U-Haul's violations of Use Permit No. 7575; and

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WHEREAS, the City Council has carefully considered all of the evidence before it, including the June 28, 2007 staff report to the Zoning Adjustments Board, the transcript of the June 28, 2007 Zoning Adjustment Board, subsequent written communications, the staff report prepared for the City Council meeting on September 18, 2007 and the testimony and additional documents submitted at the public hearing on September 18, 2007; and

WHEREAS, no evidence was submitted at the Council hearing refuting Code Enforcement's numerous citations and notices to U-Haul of its violations of Use Permit No. 7575 by parking in excess of 20 trucks on the U-Haul lot and parking U-Haul trucks in the public right of way; and

WHEREAS, the City Council has evaluated the probative value of all of the above evidence, drawn reasonable inferences therefrom, and considered the credibility of the various witnesses, based on both their observed demeanor at the public hearing before the City Council and the substance of their testimony (e.g., whether it has been consistent over time, is internally consistent, is illogical, etc.); and

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WHEREAS, based on its review of the evidence, the City Council finds as follows:

1. The proceedings before the Zoning Adjustment Board and City Council were conducted under the procedures provided by law.

2. The following are conditions of Use Permit No. 7575:

   a. No more than 20 trucks and 30 trailers are allowed on the lot at any time.

   b. No vehicles or equipment shall be staged, stored, repaired or maintained in the public right of way at anytime.

   c. The hours of operation are 8:00 a.m. to 7:00 p.m. daily.

   d. Four off-street parking spaces shall be provided for customers at all times.

   e. U-Haul shall comply with all Use Permit No. 7575 Design Review Conditions no later than 30 days from issuance of the Council's decision.

3. The permitted use has been substantially expanded or changed in character beyond that set forth in Use Permit No. 7575.

4. The U-Haul business at 2100 San Pablo is and has been operating in violation of Use Permit No. 7575.

5. Since 1997, U-Haul has been placed on notice that parking more than 20 trucks and 30 trailers on the U-Haul lot and using the public right of way to store U-Haul trucks violates Use Permit No. 7575.

6. Despite being advised by Code Enforcement how to apply for a modification of its Use Permit, U-Haul has never followed through and submitted a completed application for modification of Use Permit No. 7575.

7. Code Enforcement issued U-Haul nine citations for violation of Use Permit No. 7575 between the period from June 13, 2004 through February 13, 2007, for total penalties of $52,900.

8. Despite Code Enforcement's attempts during the last ten years to get U-Haul to conduct its business in compliance with Use Permit No. 7575, U-Haul has failed and continues to conduct its business in violation of Use Permit No. 7575.

9. U-Haul's apology at the September 18, 2007 public hearing does not negate its serious violations of Use Permit No. 7575 and is insufficient in light of the evidence which shows U-Haul's longstanding failure to comply with the use permit.

NOW THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF BERKELEY that U-Haul Company, located at 2100 San Pablo Avenue is hereby declared to be in violation of Use Permit No. 7575 under Berkeley Municipal Code 23B.60.020, and said Use Permit is hereby revoked and its operations are ordered to cease forthwith.

APPENDIX E — ORDER OF THE SUPREME COURT OF CALIFORNIA DENYING PETITION FOR REHEARING FILED JUNE 10, 2009

Court of Appeal, First Appellate District, Division Three - No. A121811
S172748

IN THE SUPREME COURT OF CALIFORNIA EN BANC

U-HAUL COMPANY OF CALIFORNIA,

Plaintiff and Appellant,

v.

CITY OF BERKELEY et al.,

Defendants and Respondents.

The petition for review is denied.

s/ GEORGE
Chief Justice